No. 76-553

In the Supreme Court of the United States

OCTOBER TERM, 1976

WALD TRANSFER AND STORAGE COMPANY,
ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A1-A2) is not reported. The decision and order of the National Labor Relations Board (Pet. App. B1-B25) are reported at 218 N.L.R.B. No. 73.

JURISDICTION

The judgment of the court of appeals (Pet. App. D1-D2) was entered on July 26, 1976. A petition for rehearing was denied on September 20, 1976 (Pet. App. F1). The petition for a writ of certiorari was filed on October 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that petitioners' refusal to bargain with the union was not based on a reasonable good faith doubt that the union no longer represented a majority of their employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are set forth at Pet. 3.

STATEMENT

Petitioners are separately owned companies engaged in the business of transporting goods by truck and storing residential and commercial goods (Pet. App. C2-C3). Since the mid-1940's, petitioners' employees have been represented by the same local union.[1] The most recent collective agreement between the union, which has not been certified by the Board, and petitioners covered the period from March 7, 1970, through March 6, 1973.[2] Joint negotiations to replace the 1970/1973 collective agreement began in March 1973 and continued until April 11, 1974.

On the latter date, at a meeting held to finalize the new agreement,[3] the attorney representing petitioners notified the union that further negotiations could not

[1]General Drivers, Warehousemen and Helpers, Local No. 968, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Pet. App. C3).

[2]Prior to the expiration of this agreement, petitioners and the union agreed to extend its provisions through July 11, 1973 (Pet. App. C4-C5).

[3]By March 15, 1974, tentative agreement had been reached on all but three items proposed to be covered by the new collective agreement. The parties apparently believed at that time the remaining differences could be resolved without difficulty (Pet. App. C6-C7).

take place because petitioner Wald Transfer and Storage Company doubted that the union represented a majority of its employees. The attorney also stated that he had not been able to contact officials of petitioner Westheimer Transfer and Storage Company to ascertain their position, but that he would attempt to do so and advise the union accordingly. The April 11 meeting ended without any discussion of the basis for doubt concerning the union's majority status (Pet. App. C4-C7).

The Board subsequently held, by a vote of 2 to 1, that petitioners did not have a good faith doubt about the majority status of the union, and therefore had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (a)(5), by refusing to bargain with the union. Petitioners had contended before the Board that their refusal to bargain with the union after April 11, 1974, was justified because the dues checkoff cards submitted to them in November 1973 had been signed by less than a majority of their employees. The Board rejected this contention, noting that "a distinction exists between union membership and union support * * *" (Pet. App. B4)—particularly, as here, in a right-to-work state in which union membership is voluntary. In such circumstances, the Board explained, "[m]any employees while approving of the Union may not choose to give it their financial support *or* participate as members", (*ibid.*; original emphasis).

The Board also noted that, while the union had submitted the dues checkoff cards to petitioners in November 1973, petitioners had continued to bargain with the union for five months thereafter without expressing any doubt or requesting evidence concerning the union's majority status (Pet. App. B5). Moreover, the Board pointed out that (*ibid.*):

> The record does not reveal the least evidence of employee dissatisfaction with the Union, and [petitioners'] conduct in continuing to bargain

> belies an awareness of any dissatisfaction. In fact [petitioners] presented evidence that the employees had ratified the collective-bargaining agreement in July 1973, though they had received no notice from the Union to that effect.

The Board therefore ordered petitioners, *inter alia*, to bargain with the union (Pet. App. B11-B13). The court of appeals enforced the Board's order (Pet. App. A1-A2).

ARGUMENT

The sole issue presented is whether there is substantial evidence to support the Board's finding that petitioners, in refusing to bargain with the union, were not motivated by a reasonable good faith doubt concerning the union's majority status. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487. Resolution of that issue turns solely upon the application of settled law to the particular facts of this case. Consequently, further review is not warranted.

In any event, the record amply supports the Board's conclusion that petitioners did not have a good faith doubt of the union's majority status at the time they refused to complete negotiations leading to the execution of a new collective agreement. It is settled that an incumbent union, whether or not certified by the Board, enjoys a presumption of majority status.[4] *E.g.*, *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104; *National Labor Relations Board* v. *Frick Co.*, 423 F. 2d 1327 (C.A. 3). This presumption can be rebutted by evidence showing that the union has lost the support of

[4]If a union has been certified by the Board, the presumption of its majority status is not rebuttable for a period of 12 months following certification. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104.

a majority of the employees in the particular unit as well as by evidence showing that the employer had a reasonable good faith doubt of continued majority status at the time it withdrew recognition. *E.g.*, *National Labor Relations Board* v. *Crimptex, Inc.*, 517 F. 2d 501, 503 (C.A. 1); *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 589 (C.A. 5).

As noted, the union involved in this case has represented petitioners' employees for more than 25 years. At the time they terminated negotiations with the union, petitioners did not explain the basis of their purported doubts concerning the union's majority status. Indeed, petitioner Westheimer Transfer and Storage Company admitted at the hearing before the Board that it had not formulated its doubt concerning whether the union represented a majority of its employees until after the instant unfair labor practice charge had been filed (see Pet. App. B5). During the five-month period following the union's presentation of dues checkoff cards, moreover, petitioners continued to bargain with the union, in apparent good faith, without once expressing any doubts concerning the union's status.

These circumstances, coupled with the ambiguous nature of evidence showing simply that less than a majority of petitioners' employees had signed dues checkoff cards in a state in which they were not obligated to do so in order to benefit from continued representation,[5]

[5]See, *e.g.*, *Terrell Machine Co.* v. *National Labor Relations Board*, 427 F. 2d 1088 (C.A. 4), certiorari denied, 398 U.S. 929. This ambiguity was heightened in the present case by two factors. First, the union submitted new dues checkoff cards to petitioners in an effort to remove a divisive issue in the negotiations concerning the wording of the legend on the face of the cards used previously. They were not proffered to evidence majority support (Pet. App. B8 n. 5). Second, petitioners' failure to inform the union, at the time the cards were submitted to them, that the cards were the principal basis of their purported doubts concerning the union's majority status (Pet. App. B5) deprived the union of the information needed to respond directly to petitioners' objection to continued negotiations.

support the Board's conclusion that petitioners' refusal to bargain was not motivated by a good faith doubt concerning the union's status.[6]

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[6]The cases relied upon by petitioners are of no assistance to them. Whereas a challenge to the union's majority status was not made here until several months of negotiations had taken place, the issue was raised at the initial bargaining sessions in both *National Labor Relations Board* v. *Dayton Motels, Inc.*, 474 F. 2d 328 (C.A. 6), and *Lodges 1746 & 743, Int'l. Assn. of Mach. & Aero. Wkrs.* v. *National Labor Relations Board*, 416 F. 2d 809 (C.A. D.C.) (Pet. 7). The absence of any evidence of employee dissatisfaction with the union distinguishes the present case from *Taft Broadcasting, WDAF-TV*, 201 N.L.R.B. 801, and *National Cash Register* v. *National Labor Relations Board*, 430 F. 2d 542 (C.A. 7) (Pet. 8). In *Ingress-Plastene, Inc.* v. *National Labor Relations Board*, 430 F. 2d 542 (C.A. 7) (Pet. 8), in addition to significant employee turnover and four documented instances of dereliction of duty on the union's part, the union admitted to the employer that in a unit of 156 employees the 49 checkoff authorizations represented the upper limit of its employee support. In *Star Manufacturing Co., Div. of Star Forge, Inc.* v. *National Labor Relations Board*, 536 F. 2d 1192 (C.A. 7) (Pet. 8), the court relied, *inter alia*, on the facts that there had been a considerable number of terminations and a rapid turnover rate, and that the union steward had been inactive and had made statements to the company about the weakness of the union.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1977.

DOJ-1977-01